DEFACING AN ANCIENT LANDMARK—THE RETURN OF AN INDICTMENT.

ONE element of danger in the history of all government has been the tendency towards self-exaltation of governmental authority—legislative, executive, and judicial. Conscious of their own probity and purpose, with the self-confidence that attends the attainment of high office, an earnest desire to remedy evils, the multifold existence of which has at all times and in all places been truthfully asserted, those who occupy high stations in modern governments are humanly prone to see, each within his own official function, one important element of public safety, and to view restraint upon the authority of his office as an unnecessary hinderance to effective action. This is more conspicuous and is inevitable where the tribunal which acts is vested with the power to interpret the limits of its own activity; a condition present to a greater or less degree in each branch of republican government, but most conspicuously so in our Courts.

In this tendency is found at once the reason for, and the wisdom of, our jury system, and an explanation of the deep root which it has taken in all modern governments. The jury, with no appreciable tenure of service, is more free from this fault of self-exaltation than any other function of government. Its every individual act is subjected to prompt and effective check by judicial review, and since unanimity is necessary to each act its functions are practically incapable of abuse. As was stated by Sir William Blackstone:

> "The liberties of England can not but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial, by Justices of the Peace, Commissioners of the Revenue, and Courts of Conscience. And however convenient these may appear at first (as doubtless all arbitrary powers,

> well executed, are the most convenient) yet, let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon the sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles the precedent may gradually increase and spread to the utter disuse of jurors in questions of the most momentous concern."

Any judicial tendency towards interference with the jury function, or any laxity towards the administration of jury service, any opportunity afforded for making it an instrument possible to be used for personal benefit, must be viewed with disquietude if not with alarm. Today, as never before in the history of governments, eternal vigilence is the price of both national and individual liberty. We feel such confidence in the probity of our courts and so slight and passing interest in individual cases that departures from settled principals are apt to pass unnoticed, or if noticed at all are apt to be viewed with indulgence upon the grounds of convenience or celerity. The tendency of our courts of last resort towards scant consideration of purely technical defenses, interposed by persons convicted of crimes, both meets and merits the commendation of the Bar and the approval of the people, but this tendency, like all other progress, is attended with the danger of gathering such great momentum as to pass unchecked the proper barriers, and in passing to impair, if not destroy, the ancient landmarks of its limitation.

A recent decision handed down by the Supreme Court of the United States furnishes food for thought in this connection.[1]

In 1907 in the United States District Court for the Western District of North Carolina, a certain indictment was by an order of that court referred to as follows:

> "United States *v.* W. E. Breese, W. H. Pendland and J. E. Dickerson; conspiracy and embezzlement, October term, 1907 'a true bill,' J. M. Allen, foreman."

At the November term the defendants each pleaded "not guilty," but the order provided that the plea should not "pre-

[1] Breese *v.* U. S., 226 U. S. 1, 57 L. Ed. 97.

vent their taking advantage upon motion in arrest of judgment, or on motion for new trial, of matters and things which could be taken advantage of by motion to quash or by demurrer; but upon motion in arrest of judgment or for a new trial such matters and things might be heard and determined as if the same were being heard upon motion to quash or by demurrer." The case was put down for trial June 21, 1909, when "the defendant pleaded in abatement and moved to quash on the grounds that the foreman of the grand jury delivered the indictment to the judge during the session of the court but in the absence of the other grand jurors." The court excluded the plea and overruled the motion; the defendants were tried and convicted. Upon writ of error to the Circuit Court of Appeals, six questions were certified to the Supreme Court of the United States, the sixth of which practically included the preceding five and was as follows:

> "Would the defendants, who had pleaded not guilty to such an indictment under an order of court, by the terms of which such plea of not guilty should not operate or have the effect to prevent their taking advantage upon motion in arrest of judgment or on motion for a new trial, of all matters and things which could be taken advantage of by motion to quash or by demurrer, be entitled to have such indictment quashed on motion made by them after the expiration of the term at which the indictment had been found and after the final discharge of the grand jury which found it, and after the denial by the court of a previous motion to quash, made by the defendants on other grounds, in which first motion to quash they had alleged that said indictment had been duly returned into open court by the grand jury?"

That court answered this question in the negative, which was conclusive of the case.

Mr. Justice Holmes in a very brief opinion makes three statements worthy of remark. First, he says, the facts are:

> "* * * that more than twelve jurors voted to find the indictment a true bill. That when this action had been taken, the grand jury was in session in a room adjoining the courtroom, on the same floor, with a door opening

> into the courtroom. The foreman left the grand jury, went into the courtroom with the bill of indictment and handed it to Judge Purnell, the presiding judge, in person, the judge being then on the bench and the court open, and that the judge looked over the indictment and handed it to the clerk in open court and that the foreman then returned to the grand jury room and proceeded with the business of the grand jury there assembled; that the grand jury did not accompany him when he brought the bill of indictment into the courtroom and handed it to the court."

Second, he says "that the mode of procedure was the same as that prescribed by the laws of North Carolina." In this he is correct, but the origin of that rule is interesting.

In State *v.* Bordeaux,[2] the court says:

> "We believe a loose practice prevails in many of our courts with respect to return of bills of indictment into court by the grand jury. It is often the case that the bills are carried into court by the foreman alone, but this is a practice to be condemned, because it is not the legal mode of procedure. The law requires that the grand jury should make their return in a body so that the court may see that they, as a body, assent to the return made."

To avoid the effect of this decision, the legislature of North Carolina passed an act providing that in felonies not punishable with death, the foreman of the grand jury alone might return the indictment. The wisdom of such a statute is indeed doubtful, but regardless of that question it could not have controlled in the Breese case, for it is well settled that the Federal Constitution requires such cases to be prosecuted by indictment and that the terms "indictment" and "grand jury" must be interpreted in accordance with their meaning under the common law as it was in force in the colonies in the year 1789, and "no law of the State made since 1789 can affect the mode of procedure in criminal cases." [3]

Third, Mr. Justice Holmes says: "The reasons for the requirements, if ever they were very strong, have disappeared, at least in part, and we have no doubt that Congress, like the State

[2] 93 N. C. 563.

[3] Taney, Chief Justice U. S. *v.* Reed, 12 Howard 366.

of North Carolina, could have done away with it if it had seen fit to do so instead of remaining silent." When this brief disposition of so serious a question as the method of procedure against a citizen arraigned to answer a felonious charge, is compared with the exhaustive review of all the cases upon this subject by Brawley, Judge, in Renegar *v.* U. S.,[4] the final utterance from our court of last resort is disappointing. Brawley, Judge, says: "The overwhelming weight of opinion and authority is that it is essential to the validity of an indictment that it be presented in open court and in the presence of the grand jury." He cites King, Judge, in Commonwealth *v.* Crams,[5] saying: "Let any man, be he layman or lawyer, consider the consequences if every individual could at his pleasure throw his malice or prejudice into the grand jury room; * * * there has hardly been a session of the grand jury for years at which an instance of personal solicitude has not occurred to some of its members to obtain or prevent the presentment of indictments of parties." Brawley, Judge, continues: "It is not without reason that this formality is required, for before a man can be held to answer for an infamous offense, at least twelve of the grand jurymen must agree to the finding of the bill. If the grand jury is present when the presentment is made, their assent is conclusively presumed; * * * if they are not present, there can be no such presumption."

Examination of the question decided by the Supreme Court, from the point of view of the most technical rules of pleading, discloses no rule which can be strained sufficiently to preclude the defendant from raising the question as it was raised. The order of the court did not show affirmatively that the grand jury had returned the indictment. This showing is essential.[6] The defendant could not have been required to raise the question by motion to quash, because a ruling upon such a motion is not reviewable and does not save the point upon the record. It could only have been raised by a plea in abatement, averring a matter not appearing upon the record, or by general demurrer

[4] 172 Fed. 646, 26 L. R. A. (N. S.) 683.
[5] 2 Clark (Pa.) 172.
[6] Crane *v.* U. S., 162 U. S. 644.

searching the entire record; either was sufficient. Had an order been entered showing a proper return of the indictment a motion to correct the order might have been proper, but the defendants were under no obligation to make this motion, even had the order been so entered. "It is the duty of the Commonwealth through her officer to conduct her prosecution according to the law, and no obligation rests upon the accused to point out errors for the benefit of the Commonwealth." [7] But as the order of the court made no such showing, there was nothing to be corrected.

If the legal effect of the act of the foreman coming alone into the courtroom was an appearance by the grand jury in court, and if his handing to the judge the paper endorsed a true bill by the foreman, can be correctly designated as a reporting of said indictment by the grand jury, then the court was correct in its ruling.

But if it be true that the appearance of the foreman in the courtroom alone is not the appearance of the grand jury, or if the act of the individual foreman handing the indictment to the judge is not the report of the jury, then the ruling of the court was clearly erroneous.

Upon this question there is an abundance of authority which speaks with unanimity and force.[8]

After laying down the rule that an indictment must be returned "in open court by a grand jury," Taylor, J., in Goodson *v.* State,[9] says:

> "Were the rule otherwise it shall have rendered it possible for a designing or revengeful foreman of a grand jury to ruin a citizen by surreptitiously filing with the clerk in his office an indictment manufactured by himself alone, upon which his fellow jurors had taken no action."

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[7] Jones *v.* Commonwealth, 100 Va. 842.

[8] "F. Return filing and record—1. Return on Presentment.

"The finding by a grand jury of a true bill and the endorsement thereon to such effect are not alone sufficient to render it valid as an indictment; but it is further necessary that the bill should be presented or returned by the grand jury in open Court." (Citing numerous cases from fifteen states.) 22 Cyc. 210.

[9] 29 Fla. 511, 30 Am. St. Rep. 135, 139.

In the State *v.* Heaton,[10] Green, Judge, says:

"The solemnity required by law in making a criminal accusation is thus stated by the court in the Commonwealth *v.* Cawood, 2 Va. Cas. 541:

"The bill of indictment is sent or delivered to the grand jury, who having heard all the evidence adduced by the Commonwealth, decide whether it is a true bill or not. If they find it so, the foreman of the grand jury endorses on it 'a true bill' and signs his name as by the *whole grand jury* and *in open court* it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is the *evidence* required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury with the endorsement aforesaid, the party charged by it *is not indicted,* nor is he required or bound to answer to any charge against him which is not so presented. * * * There is no question but that this correctly described the regular and proper mode of proceeding in the institution and presentation of criminal charges both in England and in this State."

Cawood's case has not only received the approval of the Supreme Court of West Virginia, but the doctrine therein laid down has been repeatedly and emphatically reiterated in Virginia —in White's case,[11] in Simmon's case [12] and in Price's case.[13] In the latter Monocure, President, says of the principal case:

"It is a case of the highest authority. It was argued with great ability by very able counsel for both the Commonwealth and the accused and was decided by very able judges and it settled the question as to the necessity of a record of the finding of the indictment by the grand jury.

"No indictment is allowed to be filed in court and to become matter of record, unless it was brought into court by the grand jury in a body and delivered to the court by the foreman. Commonwealth *v.* Johnson, First Thatcher Criminal Cases (Mass.) 284.

"There must be an indictment found by a regular grand jury of the county, and it must be presented in open court by the foreman of the grand jury in the presence of at least twelve of such grand jurors.

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[10] 23 W. Va. 778.
[11] 29 Gratt. 824.
[12] 89 Va. 156.
[13] 21 Gratt. 846.

> "The case is before us as though there were never any indictment found, it is as though the parties, the State, and the defendant voluntarily appeared in court and made up an issue. Pond *v.* State, 47 Miss. 42."

Is it true that in the Breese case there was a record of the finding of an indictment by the grand jury? A record, the existence of which is absolutely essential to the jurisdiction of the court.[14]

What evidence was presented to the lower court showing that the indictment had been returned to the grand jury? It was brought in by the foreman *alone* without even the statement that it was concurred in by twelve of the grand jurors. The endorsement of the foreman thereon, "a true bill"—that is, that there should be an indictment or an expression of his opinion that it was the finding of the grand jury, but by what authority could the court have said that twelve of the grand jury concurred in the finding? Suppose the foreman had so proclaimed in open court. This would come within the condemnation of the unanswerable reasoning of the court in Goodson *v.* State.[15]

In Ex parte Bain it was held, in an opinion, the soundness of which has never been questioned, that an indictment for such an offense is a jurisdictional prerequisite in the Federal Courts. A constitutional requirement without which the court could not proceed, without which the proceedings were a mere nullity; which formed the very foundation of the power of the court to require the prisoner even to make answer to the charge, or permit the court to hear evidence, or to pronounce judgment.

Surely the finding of the grand jury, which is the foundation of the structure, must be shown by evidence of as high an order as the verdict of the petit jury which rests upon it. No court would for a moment consider the correctness of a judgment based upon a verdict of a petit jury returned into court by the foreman of the jury alone. This is because the law requires the concurrence of twelve men in the finding of the verdict. The law requires the concurrence of the same number in the finding of an indictment. If the one may be evidenced by the statement of the foreman, why may not the other? There is even more

[14] Ex parte Bain, 121 U. S. 1. [15] *Supra.*

reason why the return of the foreman of the grand jury should not be sufficient than that the return of the foreman of the petit jury should not be sufficient. The return of the petit jury must be the finding of the entire jury, which every man knows. The return of the grand jury may be of twelve of its number, and it is neither impossible or improbable that a foreman might be of the opinion that a majority of the grand jury was sufficient and thus in all faith and in all honesty make an erroneous report upon this point, and moreover, the defendant is present in court when the verdict of a petit jury is returned and has knowledge of the proceedings and may instantly interpose his objection, but when an indictment is returned he is not supposed to be present and neither has opportunity to know of any irregularity nor to object thereto. If peradventure, he pleads before he ascertains the facts, he is forever estopped by the decision here reviewed to call the attention of the court to a want of jurisdiction predicated upon a fact known to the court, but unknown to the defendant.

To permit the statement of the foreman, even if made in open court, to be acceptable evidence of the action of the grand jury, would be a delegation to him of the authority both of eleven other members of the grand jury, and of the court itself. It is the province of the twelve members of the grand jury to act, and if they act through their foreman, it is the delegation of their high function and however correctly he may represent their views and their wishes, it is none the less a delegation. It is the province of the court to ascertain judicially that twelve members of the grand jury have concurred in the finding, and for the court to constitute the foreman of the grand jury its agent to ascertain this fact, is to delegate to him the power of judicial determination, centering in one individual the functions both of court and of grand jury, the concurrent, separate and independent action of each being a constitutional prerequisite to the power of the court to call upon the prisoner at the bar to answer. But it is, in effect, held by the court that, admitting the irregularity of the proceedings and admitting that the proper steps were not taken to give validity to this indictment, yet the defendants, having pleaded not guilty to the indictment, thereby

waived any objection which might be made to the irregularity of the proceedings.

As has been heretofore pointed out, there could have been no waiver of the right, because the right to move to quash and to demur was expressly reserved to the defendant.

Section 954 of the Revised Statutes relates exclusively to civil cases, and no statute of similar import to apply to criminal cases has been found.

But conceding for the sake of argument that the plea did not properly raise the objection, is it true that the defendants can be charged with having waived their right to object to the failure of the record to show affirmatively a jurisdictional prerequisite?

It is true that there are some cases holding by way of *dicta* that a plea to an indictment admits its existence as a record of the court.

Such a conclusion can be reached upon no sound reason. We are told by Mr. Blackstone, speaking of arrest of judgment,[16] that the defendant "whenever he appears in person upon either a capital or inferior conviction, may at this period as well as at an arraignment, offer any exceptions to the indictment in arrest or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offense."

In the absence of a statute, any defect in the indictment may be taken advantage of by motion in arrest of judgment. This was clearly the common-law when the meaning of its terms and its procedure became a part of the Federal criminal jurisprudence. It is settled beyond cavil that where a legislature has in part modified a procedure well recognized and well established by the common law, that it is to be presumed that it has given consideration to the whole question, and having modified it only in part, has thus silently expressed its approval of that which remains unaltered.

Section 1025 of the Revised Statutes provides: "No indictment *found* and *presented* by a grand jury * * * shall be deemed insufficient * * * by reason of any defect or imperfection in the matter of form only, which shall not tend to prejudice the defendant."

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[16] 4 Bl. Comm. 375.

The Congress has seen fit to require of defendants in criminal cases that they should before pleading make certain objections that might theretofore have been made after pleading. It is nowhere said that his rights under the common law are altered or abridged in raising the question as to the existence of an indictment. The statute has undertaken to cure only such indictments as have been "found and presented by a grand jury." [17]

If the legal effect of the facts which actually transpired was at variance with any implied recitals of the record, the trial court erred in excluding the plea. In the language of Mr. Justice Miller in Ex parte Bain,[18] "if the indictment is invalid, there is nothing before the court on which it could hear evidence or pronounce judgment." There is nothing before the court which the prisoner, in the language of the constitution, can be held to answer, and if the contention of waiver were well taken, a court might proceed to try a defendant upon a "rule to show cause why he should not be hanged."

The doctrine that a defendant cannot waive a constitutional privilege is as old as our theory of constitutional law. The fifth amendment provides that no man shall be held to answer such an offense as this herein, except upon presentment or indictment of a grand jury.

In Hurtado *v.* California,[19] the question was whether the Fifth Amendment taken together with the Fourteenth Amendment operated as a limitation upon the power to arraign without indictment. The court held that this was an inhibition only upon the Federal Government, but Mr. Justice Harlan, in a characteristically able and exhaustive dissenting opinion, holds that, aside from the Fifth Amendment, the Fourteenth Amendment requires a valid indictment as a jurisdictional prerequisite, and that if this were not true "the clause of the Fourteenth Amendment forbidding the deprivation of life or liberty without due process of law would not be violated by a State regulation dispensing with

[17] "Where the record fails to show that the indictment was returned or presented by the Grand Jury in open court, the objection may be raised not only by a motion to quash, but also by a motion in arrest of judgment, or on writ of error, or appeal." 23 Cyc. 216.

[18] *Supra.*

[19] 110 U. S. 516.

petit juries in criminal cases and permitting a person charged with a crime involving life to be charged before a single judge, or even a justice of the peace, upon a rule to show cause why he should not be hanged."

Lord Erskine in defending, before the judges of the King's bench, the Dean of St. Asaph has said:

> "If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the Supreme Criminal Court, but could only commit him for safe custody which is equally competent to every common justice of the peace. The grand jury alone could arraign him, and their decision might likewise discharge him by throwing out the bill with the names of all your lordships as witnesses on the back of it."

It may be more convenient in the administration of business that the grand jury should not await the presence of the judge or the opening of court. It may be more economical in time and in jurors' fees that the grand jury should not disturb their deliberations in order to report their findings to the court, but it is the observance of such rules as these and at the expense of such inconveniences as they may be deemed, which marks the difference between a Communism and a Republic; the difference between the mob and the State. It were as much a defense to the anarchy of a mob that their victim had confessed his guilt under the halter, as it is to a court, which has deprived a defendant of his constitutional rights; that it was afterwards *ad judicam* or *ad hominem,* convinced of the guilt of an accused, held, arraigned, tried, and condemned without the forms of law.

It is not denied that there is a tendency of the courts which is in keeping with the tendency of the times, to justify the means by the end. Some courts have extended the doctrine of waiver beyond its original occasion, which Mr. Bishop says is founded upon necessity, having gone far beyond the call of necessity to serve convenience at the sacrifice of constitutional rights.

It is not out of tender regard for the defendant alone that the common law threw around him the barriers of indictment and trial by jury. A man has no more a right to surrender his life

or his liberty, than he has to commit self-slaughter. The doctrine of waiver can extend no more to the one than to the other. It is a crime to attempt suicide, and a contract of servitude is absolutely void upon grounds of public policy. How then, can a citizen have the power to vest any number of men, it matters not in what name they be assembled, or by what titles they call themselves, with the power to put himself or his liberty to judgment?

The power and authority to pass in judgment upon the life and liberty of a citizen is vested only in the sovereign government, and from it is delivered to its officers and agents to be enjoyed and executed only upon the strictest compliance with the letter of their authority.

This is what we know as the jurisdiction of the court, and when once it proceeds without its jurisdictional prerequisite, the judge upon the bench, and the jurors in the box are acting none the less in violation of the law, in undertaking to try or condemn him, because they chance to be assembled in a hall of justice.

If the fact that there was no valid indictment could be waived, certainly the fact that there was no paper purporting to be an indictment, can be waived, and as Mr. Justice Harlan has very pertinently said, a man might then stand mute before the District Court "upon a rule to show cause why he should not be hanged," and upon a writ of error or petition for habeas corpus, or even upon a delayed protest before the tribunal which asserted this unconstitutional authority, be held to have waived all objection and to stand properly adjudged.

In Crane *v.* United States,[20] Mr. Justice Harlan says:

> "Neither sound reason nor public policy justifies any departture from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to the established modes of procedure devised for the security of life and liberty. Nor ought the courts in their abhorrence of crime, nor because of their

[20] 162 U. S. 644.

> anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving the life and liberty of an accused are often prepared."

It is to be earnestly hoped that when our court of last resort next has occasion to consider this tremendously important question it will not so lightly regard an ancient landmark of the law nor dismiss the expressed wisdom of many centuries with the scant phrase "the reasons for the rule have disappeared."

W. R. Staples.

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